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In the Supreme Court of the United States

OCTOBER TERM, 1954

CARLOS MARCELLO

v.

EDWARD J. AHRENS, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE (JOHN M. BONDS, OFFICER IN CHARGE, SUBSTITUTED IN PLACE AND STEAD OF EDWARD J. AHRENS)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 32-44) is reported at 212 F. 2d 830. The opinion of the District Court (R. 19-24) is reported at 113 F. Supp. 22.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1954 (R. 45), and a petition for

rehearing was denied on May 25, 1954 (R. 45-47, 51). The petition for a writ of certiorari was filed on June 17, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the specific provisions of Section 242(b) of the Immigration and Nationality Act of 1952, rather than the general provisions of the Administrative Procedure Act, govern deportation hearings, and if so whether such hearings meet constitutional standards of due process.

2. Whether Section 241(a) and (d) of the Immigration and Nationality Act, requiring deportation for offenses committed prior to the Act which were not grounds for deportation at the time of commission, violate the constitutional proscription against *ex post facto* laws.

3. Whether petitioner has established that his case was prejudged.

STATUTES INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952 (66 Stat. 163, 8 U. S. C. 1101 *et seq.*) and of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are set forth in the Appendix, *infra*, pp. 13-19.

STATEMENT

After a hearing before a special inquiry officer of the Immigration and Naturalization Service, an order was entered on February 20, 1953, that the alien petitioner be deported under Section 241(a)

(11) of the Immigration and Nationality Act of 1952, (hereinafter referred to as the Act), in that on October 29, 1938, he had been convicted of violating federal laws relating to traffic in narcotic drugs (Pet. XXXIX-LIV). At the hearing petitioner and his counsel had been advised of their right to apply for the Attorney General's discretionary suspension of deportation under Section 244(a)(5) of the Act, but they declined to make such application (Pet. XLVII). On March 4, 1953, the special inquiry officer denied petitioner's motion to reopen the hearing so that he might apply for suspension of deportation, on the ground that petitioner and his counsel had been advised of their right to file such application at the time of the hearing but had refused to do so (Pet. XXXV-XXXVIII).

After a hearing, the Board of Immigration Appeals, on June 1, 1953, affirmed the order of deportation (Pet. XVII-XXXIV). At the instance of petitioner's counsel, the Board itself considered whether suspension of deportation should be granted even though no formal application had been filed. The Board noted that, while consideration of confidential information was permitted, it would under the circumstances "consider only the record, consisting of the hearing and exhibits, in reaching a decision" (Pet. XXXI). In deciding that the discretionary relief of suspension of deportation was not warranted, the Board referred to "the record of [petitioner's] conviction in 1938 for two transfers of bulk marihuana, totaling 380 ounces (Ex. 4); a Federal Bureau of Investigation

Report (Ex. 5) which shows that he was arrested on several occasions, that most of the charges were dismissed but that in 1930 he was sentenced to nine to fourteen years for assault and robbery for which offenses he was pardoned on July 25, 1935; clippings from newspapers published in New Orleans, Louisiana (Ex. 7) which the [petitioner's] own counsel submitted and which refer to the [petitioner] as a racketeer, 'number one mobster in Louisiana'; etc.; and his refusal to testify before the Kefauver Committee" (Pet. XXXIII).

On June 2, 1953, petitioner filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Louisiana. He alleged, *inter alia*, (1) that 8 U. S. C. 1252(b) (Section 242(b) of the Act) was in violation of the due process clause of the Fifth Amendment, in that it did not meet the Amendment's requirements of fairness and impartiality in a hearing, and was violative of the Administrative Procedure Act (5 U. S. C. 1001 to 1011, and particularly Sec. 1004(*c*)); (2) that on the date of petitioner's arrest the Attorney General made a public statement, which was bound to influence the special inquiry officer, to the effect that petitioner was an undesirable citizen for whose deportation the proceedings were designed, and that in 1952 the Attorney General prepared a list of 152 persons, including petitioner, whom he desired to deport; (3) that 8 U. S. C. 1251(a)(11) and (d) (Section 241(a)(11) and (d) of the Act) were unconstitutional as *ex post facto* laws; (4) that the special inquiry officer had arbitrarily re-

fused to reopen petitioner's hearing to consider his application for suspension of deportation (R. 2-13). In his return, respondent alleged that petitioner's deportation had been conducted in accordance with the Constitution, laws, and regulations of the United States, and that petitioner had been properly found deportable under Section 241 of the Act. Respondent also filed the official Immigration Service record of petitioner's deportation proceedings. (R. 14-16.)

After petitioner's counsel introduced in evidence the entire record annexed to the return, he rested his case, and the District Court heard argument for both parties (R. 18). The District Court thereafter filed an opinion holding the deportation order valid (R. 19-24), and entered an order discharging the writ of habeas corpus (R. 25). On appeal (R. 26), the court below unanimously affirmed the judgment (R. 45), and later denied a petition for a rehearing (R. 45-47, 51).

ARGUMENT

1. Petitioner contends that his deportation hearing, admittedly conducted in conformity with Section 242(b) of the Immigration and Nationality Act, was invalid because it did not comply with the terms of the Administrative Procedure Act (A. P. A.) in that (1) investigative and prosecuting functions of the special inquiry officer are commingled with his adjudicating functions and (2) the officer is amenable to the supervision of the Attorney General and his subordinates charged with

the enforcement of the immigration laws. Petitioner argues, first, that as a matter of statutory construction, the A. P. A. is controlling despite the specific provisions of Section 242(b), and, second, that even if this is not so, the A. P. A. sets the constitutional standards for a due process hearing so that Section 242(b), insofar as it departs from the A. P. A., is unconstitutional. Both arguments are clearly mistaken.

a. As the court below held (R. 37-38), Congress plainly intended the specific provisions of Section 242(b) to govern in deportation proceedings. That section provides that the procedure it prescribes shall be "the sole and exclusive procedure for determining the deportability of an alien under this section." In turn, Section 7(a) of the A. P. A. provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." If it stood alone, Section 242(b) of the Immigration Act, enacted after the A. P. A., would control here. But Section 7(a) of the A. P. A. itself, providing precisely for such a result, leaves no doubt that deportation hearings are governed by the specific provisions of Section 242(b) and not by the general provisions of the A. P. A.*

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* *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C.A. D.C.), affirmed by an equally divided Court, 346 U. S. 929, invoked by the petitioner (Pet. 33), dealt with the availability of judicial review of deportation orders under A. P. A. Section

This unmistakable result of the plain statutory language is not altered by the general remarks of Senator McCarran and Representative Walter to which petitioner refers (Pet. 32-33). Apart from the broad considerations against petitioner's proposal to amend the specific and unambiguous language of the Act through the generalized comments he cites from the congressional debates, the fact here is that these comments themselves fail to support petitioner's view when they are considered in the light of the background of Section 242. After this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, had held that the Administrative Procedure Act applied to deportation proceedings, Congress, following a suggestion in the opinion that alteration of this result was "a simple matter" (339 U. S. at 47), passed a rider to an appropriation act (64 Stat. 1048) exempting deportation proceedings from Sections 5, 7, and 8 of the A. P. A. The path was thus opened for the Immigration Service to resume its prior practice of having one individual act as both presiding and examining officer, a practice which, although unfavorably commented upon by some courts, had been consistently held not to vitiate hearings otherwise fair. *E. g.*, *Palmer* v. *Ultimo*, 69 F. 2d 1, 2 (C. A. 7), certiorari denied, 293 U. S. 570; *In re Giacobbi*, 32 F. Supp. 508, 515

10, not with whether Section 5(c), relating to hearing officers, applied in deportation hearings. There is no specific and exclusive provision in the Immigration Act relating to judicial review comparable to the detailed provisions of Section 242 (b), governing hearings.

(N. D. N. Y.). This combining of functions was then forbidden, however, by Section 242(b) of the 1952 Act, which provides:

> No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.

Thus, the major evil which this Court in *Sung* had said the A. P. A. was "intended to ameliorate" (339 U. S. at 46) was substantially removed by repeal of the appropriations rider and enactment of Section 242. It is in this sense that the remarks on the floor of Congress that the A. P. A. was being made applicable to deportation must be interpreted in the present context. Such a view amply respects the legislative history and answers the unhappy suggestion that broad observations in debate may be substituted for the specific provisions Congress enacted.

b. Equally without merit is petitioner's contention that even if Congress expressly declared them inapplicable, the provisions of the Administrative Procedure Act must be followed to satisfy constitutional standards of due process. The argument is built upon language in the *Sung* case suggesting that hearings not conforming to that Act might not meet the Constitution's requirements. 339 U. S. at 50. Elsewhere in the opinion, however, the Court observed that if inclusion of immigration hearings

within the coverage of the A. P. A. was erroneous, "relief from Congress is a simple matter" (p. 47), an explicit recognition that suitably fair procedures could be had without adhering to the general prescriptions of that Act. And, as we have noted, Congress acted promptly to exempt deportation proceedings, evidencing a belief that the A. P. A. provided safeguards considerably beyond the constitutional minima. That the belief was well founded is demonstrated by the long history of judicial approval of deportation proceedings prior to the A. P. A.—*e. g.*, in *Tisi* v. *Tod*, 264 U. S. 131, where this Court held that unless there is error "so flagrant as to convince a court that the hearing had was not a fair one," the requirements of due process are met, as they were in the instant case, if the alien is given due notice of the charge and ample opportunity to prepare and present his case, with the aid of counsel if he desires it.

The argument petitioner now makes as to a constitutional necessity for adherence to the A. P. A. was urged in a number of cases started while the appropriations rider was in effect, and was consistently rejected by the courts. *Belizaro* v. *Zimmerman*, 209 F. 2d 282 (C. A. 3); *United States ex rel. Catalano* v. *Shaughnessy*, 197 F. 2d 65, 67 (C. A. 2); *Barber* v. *Yanish*, 196 F. 2d 53, 54, fn. 1 (C. A. 9), certiorari denied, 344 U. S. 817. It has even less substance now under the Immigration and Nationality Act of 1952, which not only bars commingling of functions at a particular hearing but

spells out numerous rights of the alien. Thus, the Act requires that the alien have reasonable notice of the charges against him and of the time and place of hearing; assures the alien the right to examine evidence against him, to present evidence in his own behalf, and to cross-examine government witnesses; and requires that a decision of deportability be predicated upon reasonable, substantial, and probative evidence. The essential elements of due process are clearly embodied in the statute.

2. Petitioner, recognizing that the Court has rejected the argument within the past year, urges only faintly that Section 241(a)(11) and (d) are unconstitutional as violative of the *ex post facto* clause of Article 1, Section 9, Clause 3, of the Constitution (Pet. 35-36). It is well established that deportation laws are civil, not criminal, in nature, and that their retroactive application does not violate the constitutional proscription against *ex post facto* laws. *Galvan* v. *Press*, 347 U. S. 522, 531; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594; *Mahler* v. *Eby*, 264 U. S. 32, 39; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591. No ground is suggested to warrant reconsideration of this settled rule.

3. Finally, petitioner contends (Pet. 36-40) that the issuance by the Attorney General in 1952 of a confidential list of undesirable aliens, on which his name was included, and a press release by the Attorney General at the time of petitioner's arrest had the effect of prejudging his deportation case before the special inquiry officer and the Board of

Immigration Appeals. The attempt thus to bring the case within the doctrine of *Accardi* v. *Shaughnessy*, 347 U. S. 260, is unsupported by the record.

As the court below pointed out, with respect to deportability there were no contested factual issues since petitioner's conviction was a matter of record and his deportability under Section 241(a)(11) was therefore established as a matter of law. The special inquiry officer was not required to pass upon any application for suspension of deportation since petitioner failed to submit one when the opportunity was afforded him. As for the Board of Immigration Appeals, it undertook, at the request of petitioner's counsel, to consider whether deportation should be suspended even though the application was not timely. In so doing it expressly noted that it was making no attempt to ascertain whether there was a confidential file with respect to petitioner (Pet. xxxi). It exercised its discretion on the basis of matters submitted by petitioner's counsel, assuming all undeveloped issues of fact in petitioner's favor. Moreover petitioner made no attempt at the habeas corpus hearing to prove his allegations of prejudgment (see R. 18), whereas in *Accardi* no hearing on the habeas corpus petition was permitted by the district judge and Accardi was precluded from offering proof which he contended would show prejudgment of his application for suspension of deportation.

The point in *Accardi*, as we understand it, was that the alien there was denied an opportunity to

prove that his application for discretionary relief had been prejudged; here, there was no such denial and no attempt by petitioner to establish his claim. He is not entitled to a second opportunity.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1954.

APPENDIX

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163 *et seq.* provides in pertinent part:

Section 241, 66 Stat. 204 (8 U. S. C. 1251):

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
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> * * *
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;
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> * * *
>
> (d) Except as otherwise specifically provided in this section, the provisions of this sec-

tion shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * *

Section 242(b), 66 Stat. 209 (8 U. S. C. 1252):

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the

special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

Section 101(b)(4), 66 Stat. 171 (8 U.S.C. 1101(b)(4)):

The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

Section 244, 66 Stat. 214 (8 U. S. C. 1254):

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * *
>
> (5) is deportable under paragraph * * * (11) * * * of section 241(a) for an act committed or status acquired subsequent to such entry into the United States * * *; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.
>
> * * *

The Administrative Procedure Act, 60 Stat. 237 *et seq.* provides in pertinent part:

Section 5(c), 60 Stat. 240, 5 U.S.C. 1004(c):

> * * * Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *

Section 7, 60 Stat. 241, 5 U. S. C. 1006:

> In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> (a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or desig-

> nated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. * * *

Act of September 27, 1950, 64 Stat. 1044, 1048, provides:

> Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007).

Section 403 of the Immigration and Nationality Act of 1952, 66 Stat. 279, provides:

> (a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:
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> * * *
>
> (47) The paragraph headed "General provisions—Department of Justice" in Chapter III of the Supplemental Appropriation Act, 1951 (Public Law 843, Eighty-first Congress);
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> * * *

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